



U.S. SMALL BUSINESS ADMINISTRATION  
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

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**BY HAND**

Mr. William F. Caton  
Secretary  
Federal Communications Commission  
1919 M Street, Room 222  
Washington, D.C. 20554

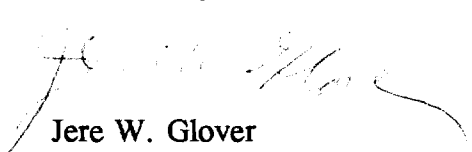
**Re: CC Docket 96-45**

Dear Mr. Caton:

The Office of Advocacy of the Small Business Administration transmits herewith the original and four copies of its Comments in response to the Notice of Proposed Rulemaking in the above-referenced docket. Included with this package is a duplicate "file copy" of this pleading. Please date stamp this copy and return it to the messenger delivering this filing.

Thank you in advance for your assistance in this matter. If you have any questions, please contact me or David Zesiger at 202/205-6532.

Respectfully submitted,

  
Jere W. Glover  
Chief Counsel

Enclosures

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APR 12 1996

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of

Amendment of Part 36 of the  
Commission's Rules and  
Establishment of a Joint Board

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CC Docket No. 96-45

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Comments of the Chief Counsel for Advocacy  
of the United States Small Business Administration

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Jere W. Glover, Esq.  
Chief Counsel  
David W. Zesiger, Esq.  
Assistant Chief Counsel  
Office of Advocacy  
United States Small Business  
Administration  
409 Third Street, S.W.  
Suite 7800  
Washington, D.C. 20416  
(202) 205-6532

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of the United States Small Business Administration

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I. Introduction

The United States Small Business Administration Office of Advocacy respectfully submits the following comments in response to the Notice of Proposed Rulemaking and Order Establishing Joint Board ("Notice") released in this docket on March 8, 1996. The Notice begins the process of implementing the universal service provisions (Section 254) of the Telecommunications Act of 1996 ("1996 Act", "Act").<sup>1</sup>

The Office of Advocacy of the U.S. Small Business Administration was established by Congress to promote the interest of small businesses before agencies of the federal

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<sup>1</sup>The Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) to be codified at 47 U.S.C. sec. 151 et seq.

government.<sup>2</sup> The Regulatory Flexibility Act ("RFA") charges the Office of Advocacy with the responsibility of monitoring agency compliance with the RFA.<sup>3</sup> The Office of Advocacy has indicated its concerns with the Commission by comment submissions in the docket that preceded the instant docket dealing with universal service.

The Commission is to be congratulated for issuing the instant Notice in such a timely manner. As a consequence, however, the Notice is general and lacking in specificity, making it difficult, if not impossible to evaluate its impact on small businesses. The Notice contains few clear-cut rules or funding mechanisms rendering it futile to specify appropriate policies and exemptions for small businesses as the RFA requires. Therefore, the Office of Advocacy recommends that the Commission and the Joint Board offer all parties a further opportunity to comment at a time when the Commission's recommendations to the Joint Board are clear and specific.

## II. Background

The goal of universal service has long been a central tenet of our telecommunications policy.<sup>4</sup> Connecting all Americans to the telecommunications network benefits every

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<sup>2</sup>15 U.S.C. 634a, et seq.

<sup>3</sup>Regulatory Flexibility Act, Pub. L. 96-354 sec. 612(a), 94 Stat. 1164 (1980), codified at, 5 U.S.C. 601 et seq.

<sup>4</sup>The Communications Act of 1934 sets forth a broad mandate "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges." Communications Act of 1934, as amended, sec. 1. 47 U.S.C. sec. 151, et seq. (hereinafter "1934 Act").

American and will increasingly be the prerequisite for access to the great opportunities of the information age. The effort to provide access to the telephone network to all Americans has spurred the development of a variety of policies and mechanisms by both federal and state governments. Over six decades of effort to achieve universal service have resulted thus far in the establishment of (1) a series of subsidies to telecommunications carriers who serve high-cost areas and (2) a separate set of subsidies for low income subscribers. This broad effort has been largely, although not completely successful, resulting in the connection of approximately 99 million households or about 94 % of all Americans subscribing to the telephone network.<sup>5</sup>

The 1996 Act includes a new Section 254 which expressly articulates a policy framework for universal service, translating, for the first time, the generalized goal of universal service into specific statutory provisions.<sup>6</sup> The provisions of Section 254 change the fundamental nature of the goal of universal service in several important ways and ultimately require a comprehensive reevaluation of universal service policies and support mechanisms.

The Act instructs the Commission to appoint a Joint Board which is to recommend to the Commission a comprehensive reevaluation of the universal service concept and

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<sup>5</sup>Trends in Telephone Service, Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, February 1995, pp. 2-3 (hereinafter "Trends").

<sup>6</sup>1934 Act sec. 254.

mechanisms, including articulating and broadening the principals underlying universal service, requiring a periodic reevaluation of the definition of universal service to include advances in technology, specifying which telecommunications carriers will contribute to and which will benefit from support mechanisms, and providing for support of telecommunications services for rural health care providers and educational providers and libraries.

### III. Universal Service Fund Reduction Can No Longer be the Stated Goal of the Commission

Section 254(b) mandates a set of principles for the Commission and the Joint Board to use in formulating universal service policies.<sup>7</sup> These principles tend to expand the scope of universal service to include services and concepts not heretofore associated with universal service. Section 254(b) introduces new universal service principles, including quality of service, affordability, specific and predictable support mechanisms and comparability. It also includes expansions of the traditional scope of universal service expressly to include access to advanced services, low income assistance, and access to advanced telecommunications services for schools, health care providers and libraries. In this sense, they reverse the Commission's stated goal of reducing the universal service fund which was a principal thrust of the Commission's efforts in its previous docket on universal service.<sup>8</sup> The 1996 Act

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<sup>7</sup>1934 Act sec. 254.

<sup>8</sup>CC Docket 80-286. See, e.g., Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, Notice of Proposed Rulemaking and Notice of Inquiry, 10 FCC Rcd 12309 (1995).

makes it clear that the goal of universal service is not predicated on the Commission's interexchange pricing policies or, ultimately, even on the Act's and the Commission's policy to foster competition in the local exchange market.

### III. Services to be Included in Definition of Universal Service

A central aspect of the universal service proceeding is the definition of which services shall be supported by universal service funding mechanisms. The Notice describes five core services: voice grade access, touch-tone, single party service, access to emergency services, and access to operator services given direction the direction technology is driving the system. The Office of Advocacy supports the inclusion of these basic service elements as services to be supported.

In defining the services to be eligible for universal service support, the Commission must strike a careful balance between, on the one hand, aggressively implementing the Act's mandate to expand the definition of universal service and, on the other hand, constraining the cost of the subsidies necessary to implement them. Inclusion of the five above-referenced core services would not unduly expand the cost of universal service subsidies since all five are already widely deployed and are generally considered by users to be an expected part of their telephone service. Among the five services, the Office of Advocacy would single out touch tone, in particular, as a service to be mandated, given the increasingly important role that touch tone plays in connecting users to a wide variety of voice mail systems, information

services, and product ordering services.

Expansions of universal service beyond core services to include advanced telecommunications and information services is expressly mandated by the Act, however, expansions should be carefully weighed for their effect on overall rates for all users. Small business owners are more likely to accept a gradual and common-sense expansion of the definition of universal service rather than face extraordinary cost increases resulting from an overly aggressive expansion of minimum basic services.

#### IV. Business Users Should not be Excluded as Beneficiaries of Universal Service Funding Support

Section III(B)(2) of the Notice asks in part whether "support for rural, insular, and high-cost areas should be limited to residential users or residential and single-line business users, or should be provided to all users in such areas."<sup>9</sup> The Notice further asks "whether prices should vary depending on whether the customer is a non-business subscriber, a single-line business subscriber, or a multi-line business subscriber."<sup>10</sup>

That the Commission would even raise this possibility is disturbing for it indicates a willingness on the part of the Commission to lower the support available to high cost LECs.

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<sup>9</sup>Notice at ¶ 24.

<sup>10</sup>Id. at ¶ 26.



Of course, lowering this support will inevitably lead to higher rates and/or diminished service for rural customers -- a result directly at odds with the language and intent of the 1996 Act. Support for high-cost areas has never been limited to a certain subset of users. It has always been for end users generally. The 1996 Act's intent is clear and obvious -- that all Americans be given access to a wide range of telecommunications services.

If the Commission is to recommend exclusion of some users from universal service support, it bears a heavy burden of proof in demonstrating how it would override the clear intent of the Act. The Notice offers no rationale nor any factual predicate for singling out rural business users as ineligible for support. Rural business users are similarly situated as rural residential users. The cost of providing service to residences and businesses in the same high cost area do not differ significantly. The Commission should focus on determining which high cost carriers should be eligible for support not on which end users.

Small business users already typically end up with the worst of both worlds under current standard rate practices of local exchange carriers (LECs). They are typically charged significantly more than residential users for telephone service. In 1993, average monthly business rates totalled \$42.57 whereas average monthly residential rates totalled \$18.82 -- a more than two-to-one disparity.<sup>11</sup>

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<sup>11</sup>Trends at 10.

Moreover, if the Commission did recommend exclusion of some users from universal service support, it would tend to exacerbate further differences in the cost of doing business that already exist between rural and urban areas. There is no reason why should a mail order business in New Hampshire, Alaska or New Mexico pay even more of a differential for service over similar businesses in cities like New York or Chicago.

Small business users also lack the market power to negotiate the individual case-based tariffs or the volume discounts that larger corporations typically can arrange to lower their per line cost. Moreover, given the more fragile state of many rural economies, small business users in rural economies are much less able to pass on cost increases to their customers than their urban or suburban counterparts.

If the Commission is to recommend singling out business users, it must, at a minimum, develop a factual basis on which to do so. In contrast to information on residential or larger business users, statistics regarding business users, and particularly small businesses are notoriously difficult to obtain. It would be extremely useful if the Commission were to recommend requesting information on the number of small business users and the rates they are charged as a part of whatever reporting requirements it may find necessary to implement this section.

Moreover, excluding business users from the universal service subsidy would institute an implicit subsidy of high-cost residential users by high-cost business users. High-cost LECs

would ultimately be forced to raise prices on all customers. This would shift the subsidy from telecommunications service providers to local business users. This would be precisely the kind of subsidy that is expressly discouraged by the 1996 Act and its legislative history.<sup>12</sup> Moreover, if high-cost business users were singled out in this way, it could arguably meet the "adversely affected or aggrieved" standard specified by section 342 of the Regulatory Enforcement Fairness Act, triggering judicial review.<sup>13</sup>

V. Very Small Carriers Should be Exempted from Contributing to the Universal Support Mechanism

The Notice also requests comment on the 1996 Act's exemption of a certain class of carriers from the requirement of contributing to any universal service funding mechanism.<sup>14</sup> Section 254(d) of the Act clearly envisions a subset of LECs whose size, and hence whose contribution would be *de minimis*. The Joint Explanatory Statement of the Committee of Conference for the Act further identifies this class of carriers as those for whom "the administrative cost of collecting contributions ... would exceed the contribution that carrier would otherwise have to make under the formula for contributions selected by the

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<sup>12</sup>Joint Explanatory Statement of the Committee of Conference at 17. S. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 17 (hereinafter "Joint Statement").

<sup>13</sup>Contract with America Advancement Act of 1996 sec. 342. Pub. L. 104-121 (1996). Codified at 5 U.S.C. 611 (hereinafter "Contract Act").

<sup>14</sup>1994 Act sec. 254(d).

Commission."<sup>15</sup>

Section 254(d)'s grant of authority to exempt carriers whose contribution would be *de minimis* is little more than a specific application of the broader principle of the Regulatory Flexibility Act ("RFA"), which here requires the Commission to conduct essentially the same analysis. The RFA requires the Commission, *inter alia*, to "establish... differing compliance or reporting requirements that take into account the resources available to small entities."<sup>16</sup> It also requires "an exemption from coverage of the rule, for such small entities."<sup>17</sup>

The Notice also requested comment on how to determine the cost of collecting contributions and thus the threshold of the exemption. Given the difficulty of estimating the actual administrative cost of collecting contributions from a number of carriers, the Commission would appear to have little choice but to employ a constructive estimate of these costs. Such an estimate could be derived from a relevant parallel elsewhere in the Commission's rules. The Commission's existing exemption for very small carriers' contributions to the universal service fund uses a threshold of .05 percent of presubscribed lines nationwide to exempt *de minimis* contributors to the fund.<sup>18</sup> The rationale for this existing threshold is essentially the same -- a balancing of the costs and benefits of imposing

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<sup>15</sup>Joint Statement at 17.

<sup>16</sup>RFA sec. 603(c)(1)

<sup>17</sup>RFA sec. 603(c)(4).

<sup>18</sup>Part 69 - Access Charges, 47 C.F.R. Section 69.116(a).

such an administrative burden on very small LECs who are particularly ill-equipped to comply with new administrative and compliance burdens. Using such an existing standard would minimize the burden on small carriers, many of whom already understand and comply with this threshold. Employing this threshold would be a reasonable use of Commission discretion.

Finally, as with any size standard, whatever the Commission determines to be the threshold for a very small carrier is subject to prior review by the Small Business Administration's Office of Size Standards.<sup>19</sup>

## VI. The Adequacy of the Notice's Initial Regulatory Flexibility Analysis

Pursuant to the requirements of the Regulatory Flexibility Act, the Commission prepared an initial regulatory flexibility analysis ("IRFA") of the expected impact of the Notice's proposed universal service policies on small entities.<sup>20</sup> Clearly, the Commission's

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<sup>19</sup>The Small Business Act, as amended, sec. 3(a,) 15 U.S.C. sec. 632(a).

<sup>20</sup>Section 603 of the RFA requires agencies to prepare an initial regulatory flexibility analysis if a proposed rule is expected to have a significant economic impact on a substantial number of small entities. 5 U.S.C. sec. 603. The Commission's IRFA is an implied acknowledgement that its RFA certification in its Notice of Proposed Rulemaking and Notice of Inquiry in CC Docket No. 80-286 released July 13, 1995 was erroneous and no longer controlling. A local exchange carrier's dominant status is not relevant to its size or market status. Significant changes in the Commission's universal service rules will unavoidably impact a substantial number of small businesses.

universal service proposal will have a profound impact on a wide range of small entities. It is almost certain that significant new reporting, record keeping, contribution and other compliance burdens will be imposed on most small telecommunications service providers under the current Notice.<sup>21</sup> Small business users are also certain to be impacted by changes in the universal service rules. Finally, local governmental entities such as school and library districts, which are also covered under the RFA, will be particularly affected by 1996 Act's universal service provisions.<sup>22</sup>

The Commission has moved with commendable speed to begin implementation of the 1996 Act's new universal service policies. As a result, however, it is almost impossible to evaluate the impact of the instant Notice given its lack of specificity. Since, in most instances the Notice fails to articulate specific rules and implementing mechanisms, it is impossible to specify appropriate exemptions for small businesses. If all parties are going to have a realistic opportunity to comment on more detailed, specific proposals that are of great import to the entire industry, it is necessary that the Commission and the Joint Board afford all parties another opportunity to comment at the appropriate time. To fail to do so would leave the Commission's universal service rules vulnerable to later challenge that they failed to comply with the RFA.

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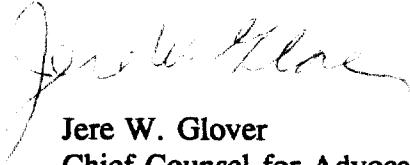
<sup>21</sup>The Commission obliquely concedes this point in its discussion of the administration of support mechanisms: "it would appear that administration of the funds will require large-scale information processing and data base capabilities." Notice at ¶ 128.

<sup>22</sup>1934 Act, sec. 254(h).

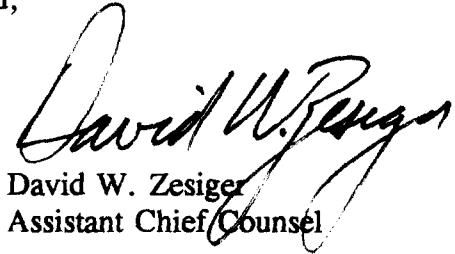
## VII. Conclusion

The universal service support mechanisms have worked well to date to encourage higher levels of telephone service and subscribership. The 1996 Act's mandate for universal service is an enormously important step forward. As the foregoing comments make clear, the Commission's implementation of the Act's universal service provisions will profoundly affect small carriers' and small business users' interests in a variety of ways. Ultimately, without a further opportunity to comment on a more specific proposal, small business' interests may not receive the consideration to which they are entitled.

Respectfully submitted,



Jere W. Glover  
Chief Counsel for Advocacy



David W. Zesiger  
Assistant Chief Counsel